INTERNATIONAL COMPETITION NETWORK

Report on Predatory Pricing

Prepared by

The Unilateral Conduct Working Group

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Executive Summary

This paper was prepared by the ICN Unilateral Conduct Working Group (UCWG) for the 7th Annual Conference of the ICN in April 2008 in Kyoto. This past year, the Working Group began the second phase of its work on the analysis of unilateral conduct. The Working Group began by examining specific practices, starting with predatory pricing and exclusive dealing/single branding. For each practice, the group gathered information through a questionnaire. This paper on predatory pricing is based on the responses of agencies and non-governmental advisors (NGAs) covering thirty-five jurisdictions.[1] We appreciate the time and effort that the respondents dedicated in support of this project.

Predatory pricing usually involves a practice by which a firm temporarily charges prices below an appropriate measure of its costs in order to limit or eliminate competition, and subsequently raise prices. During the last ten years, responding agencies brought approximately twenty-four cases in which a predatory pricing violation was established and have initiated at least five times as many investigations in which predatory pricing was alleged, but no violation was found.[2]

When analyzing predatory pricing cases, virtually all responding agencies indicated that prices must be below cost for a violation to occur. Agencies also take into account some or all of the following factors: recoupment of losses, competitive effects, predatory intent, and justifications and defenses. However, the respective weight attributed to each of these factors differs across agencies and cases, as does the way agencies combine and legally assess them. As noted, not all factors are taken into account by all agencies, and the order in which they are examined also may vary depending on the circumstances of the specific case, data availability and access to evidence. A summary of the key findings drawn from the responses is set out below.

Below-cost pricing

Virtually all responding agencies use cost benchmarks/measures to assess whether the alleged predator is selling at a loss or sacrifice. This reflects the view that above-cost pricing almost invariably constitutes competition on the merits and that enforcers should not penalize discounting in these circumstances. There is no single cost measure used by all responding agencies, and frequently agencies use more than one measure. The most commonly cited measure is average variable cost, although there appears to be a growing trend toward the use of average avoidable cost. Marginal cost is almost never used as a benchmark for a number of reasons, including the complexity of its calculation.

[1] Responses were received from agencies in thirty-four jurisdictions; six responses were received from NGAs. The questionnaire and responses are available at http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/unilateral-conduct-working-group-and-responses-2007.

[2] In most of the responding jurisdictions, private parties can challenge predatory pricing in court, but such challenges are rare.

Certain agencies apply a presumption that pricing below average variable cost is predatory, although this presumption is generally rebuttable. Most respondents acknowledged that pricing above average variable cost is not predatory or is unlikely to be predatory except in exceptional cases.

Recoupment of losses

Many responding agencies assess whether the dominant firm has the ability to obtain additional profits that more than offset profit sacrifices stemming from predatory pricing. Some of these jurisdictions use recoupment as a screen, or legal requirement to find liability. For others it may be just one relevant factor in the assessment of predatory pricing.

The examination of recoupment and consumer harm generally is not a mechanical calculation of profits and losses. Some respondents examine the likelihood, probability or possibility of recoupment by assessing the effect of the below-cost pricing combined with other factors such as entry barriers, the position of the dominant firm after predation and foreseeable market changes. Recoupment is unlikely to be found if the conduct concerns a low price already applied generally for a long period.

Competitive effects

In addition to demonstrating below-cost pricing, many responding agencies must demonstrate effects, such as market foreclosure or consumer harm to establish predatory pricing. Even if an agency does not consider market effects as part of its prima facie analysis, evidence of a lack of detrimental market effects is potentially relevant. Many respondents stated that proof of actual market effects is not necessary so long as there is evidence of likely detrimental effects.

As for the types of market effects considered, the most commonly cited included evidence of an actual or likely exclusion or foreclosure of competitors. Exclusionary effects and recoupment are closely linked. In order to recoup its losses, the dominant firm will try to exclude competitors, or discipline them by preventing them from competing vigorously. As a result, competition is weakened or eliminated and the dominant company will be able to increase its prices or maintain prices above the competitive level and harm consumers.

Predatory intent

For jurisdictions that assess intent, it is usually only considered a relevant factor in their analysis, if, and only if, prices are below the relevant cost measure. The most commonly cited type of intent is the intent to eliminate a competitor. Documents of the dominant firm showing a detailed plan to incur losses to exclude a rival are also considered. Predatory intent can be proven by direct and indirect evidence.

Justifications and defenses

In many jurisdictions, it is accepted that a pro-competitive rationale for the conduct under investigation (such as adaptations to sudden changes in market conditions, introductory pricing of new products, or the sale of products because they are damaged), efficiencies, and/or meeting competition, may operate as a justification or defense in a predatory pricing case or preclude an initial finding of predation. In most jurisdictions, justifications and defenses and their likelihood and sufficient probability have to be proven by the dominant firm.

I. LEGAL BASIS AND ENFORCEMENT

All questionnaire respondents indicated that their competition regimes prohibit predatory pricing either under competition laws of general application that do not attempt to define or provide the requirements for "predatory pricing" or under laws that specifically address unfair prices.[3]

1. General v. Specific Provisions

Eleven agencies[4] indicated that their competition laws do not specifically refer to predatory pricing, but prohibit it as one form of anticompetitive conduct under a general unilateral conduct provision. Among the twenty-three responding agencies that specifically address pricing in their laws, fourteen[5] have provisions that refer to the prohibited conduct in terms of imposing unfair purchase or selling prices. Seven jurisdictions[6] prohibit firms from selling at a price unreasonably below cost, of which the laws in three countries provide for specific cost benchmarks for predatory pricing: Kenya (average variable cost), Mexico[7] (average variable cost and average total cost), and South Africa (marginal cost and average variable cost).

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[3]Agencies in three jurisdictions (Germany, Japan, and Korea) mentioned that in addition to their unilateral conduct rules, other provisions may prohibit predatory pricing under unfair trade practices laws, which apply to firms that are not necessarily dominant or have significant market power.

[4]Those of Denmark, France, Germany, Japan, Korea, New Zealand, Peru, Singapore, Taiwan**,** Turkey, and United States. For example, Art. 3º of the Chilean Competition Act states: "Any person who enters into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition, or tends to produce such effects, will be subject to the measures prescribed by … this law, notwithstanding the other corrective or restrictive measures that may be imposed in each case."

[5]Those of Bulgaria, Czech Republic, European Commission, Ireland, Israel, Italy, Jamaica, Jersey, Latvia, Lithuania**,** Norway, Serbia, Slovak Republic, and United Kingdom. See also Hungary (extremely low prices), Switzerland (under-cutting prices), The law in Chile prohibits predatory practices.

[6]Australia, Brazil, Canada, Mexico, Kenya, Russia, and South Africa.

[7]In Mexico, the Federal Competition Commission's decision in *Warner Lambert* was declared unconstitutional because it condemned predatory pricing on the basis of the general antimonopoly provision while the Mexican constitution requires that the grounds on which a violation is found by an

All of these jurisdictions rely on broadly applicable definitions of predatory pricing. Russia uses two separate definitions for predatory pricing: one covering goods, defined as a "monopolistically low commodity price" and another for financial services, defined as "unjustifiable low prices."

Relevant criteria for identifying predatory pricing are either set out in accompanying regulations or guidelines, or developed through agency practice and/or court decisions. For example, the French Conseil de la Concurrence (French Competition Council) considers its recent *GlaxoSmithKline* decision[8] a form of "general guidance" explaining the methodology it uses to assess predatory pricing. At least seven agencies[9] (Brazil, Canada, Denmark, Jersey, Korea, Lithuania, and Singapore) have adopted guidelines and other instruments that increase transparency as to the elements and the assessment of predatory pricing.

2. Civil v. Criminal Enforcement

ICN members were asked whether predatory pricing is a civil or criminal violation in their jurisdiction. For jurisdictions with both civil and criminal laws, members were asked to explain the basis on which the agency chooses to bring a criminal or civil case and the differences in the criteria applied.

Twenty-four respondents[10] indicated that predatory pricing is a civil law violation while one respondent (Kenya) can challenge predatory pricing only under criminal laws. In

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administrative agency be spelled out in the law. As a result, the Federal Law on Economic Competition was modified in 2006 to include a specific predatory pricing provision.

[8] GlaxoSmithKline France, Decision n°07-D-09 of 14 March 2007, (http://www.conseil-concurrence.fr/user/avis.php?avis=07-D-09) (GlaxoSmithKline)

[9] Brazil: Resolution 20, Attachment 1, A, 4 (in English) http://www.cade.gov.br/internacional/Resolution%2020%20-%201999.pdf; Directive SEAE 70/2002 (in Portuguese) Canada: Competition Bureau, "Enforcement Guidelines on the Abuse of Dominance Provisions (sections 78 and 79 of the Competition Act)" (Ottawa: Industry Canada, 2001) http://strategis.ic.gc.ca/pics/ct/aod.pdf (the Canadian Competition Bureau recently released its Draft Predatory Pricing Enforcement Guidelines for public comment at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/Pred_price_e.pdf/$FILE/Pred_price_e.pdf; Denmark: Annual Competition Report 2004, Chapter 6 on Price Dumping (summary in English) http://www.ks.dk/english/publications/publications-2004/2004-06-17-competition-report-2004/chapter-6-price-dumping; Jersey: JRCA Guideline on Abuse of a Dominant Position http://www.jcra.je/pdf/050809%20Competition%20guideline%20Abuse%20of%20Dominant%20Position.pdf; Korea: Guideline for reviews on abuse of market dominance, IV; Types of and Criteria for abuse of market dominance; Lithuania: Resolution on the Establishment of a Dominant Position, Art. 20.2 http://www.konkuren.lt/english/antitrust/legislation_resoliution_52.htm; Singapore: http://www.ccs.gov.sg/NR/rdonlyres/A67B68FC-DB6F-415B-9DF1-5A97FC6855A9/17206/s47_Jul07FINAL.pdf.

[10] Australia, Bulgaria, Chile, Czech Republic, European Commission, Germany, Hungary, Italy, Jamaica, Jersey, Latvia, Lithuania, Mexico, New Zealand, Norway, Russia, Serbia, Singapore, Slovak Republic,

ten[11] jurisdictions predatory pricing is both a civil and a criminal offense. The two major differences identified in the responses regarding the criteria for bringing a criminal predatory pricing case are a higher standard of proof and an obligation to prove intent.[12]

Most agencies indicated that predatory pricing is better suited for civil rather than criminal enforcement.[13] The French Competition Council stated its view that its criminal provisions were mainly intended for hard-core cartels and bid rigging cases rather than abuse of dominance. Given the complex considerations of market structure, competitive effects, and evaluation of pricing conduct, the Canadian Competition Bureau agreed that predatory pricing may be better suited for civil enforcement rather than criminal courts. Indeed, over the last ten years no responding agency has challenged predatory pricing under a criminal statute.

3. Overview of Agency and Private Enforcement

A. Agency enforcement

According to the responses, over the last ten years, there have been approximately twenty-four cases in which a predatory pricing violation was established and at least five times as many investigations where it was alleged, but no violation was found.[14] Reasons cited for the low number of enforcement actions included a recognition of the risk that legitimate price cutting would be deterred and a reluctance to make the substantial resource commitment a predatory pricing case would entail.[15]

South Africa, Switzerland, Turkey, United Kingdom, and United States (although the Sherman Act provides for criminal prosecution, only hard-core cartel conduct is prosecuted criminally under the Act).

[11] Brazil, Canada, Denmark, France, Ireland, Israel, Japan, Korea, Peru, and Taiwan.

[12] See Canada, Ireland, and Israel (in these jurisdictions, civil litigation is subject to a burden of proof based on the "balance of probabilities," while criminal litigation requires proof "beyond a reasonable doubt"); Denmark ("intent or gross negligence" has to be proven in a criminal case, whereas a civil damage action requires only "culpa in the form of negligence"); Israel (for most monopoly offences, the proof of specific intent is required in criminal litigation).

[13] Although most agencies have discretion whether to refer a criminal case to the public prosecutor (but see Brazil and Peru), they generally only will refer accusations that amount to "serious violations" (Korea), "severe infringement" (Denmark) or when the conduct is "vicious and serious, and has wide spread influence on people's living, involves repeat offenders, or violators of cease and desist orders" (Japan). Once a case is referred, the prosecutors usually have discretion to decide whether to bring the case to court. The policy of Canada is to pursue cases criminally when the conduct is "egregious, recidivist, or corollary to cartel activity."

[14] Not all agencies provided the number of investigations. See responses from EC, Japan, and United Kingdom. Korean enforcement statistics relate to unfair trading practices of non-dominant firms and thus are not included in the figures. For a break down of the enforcement statistics by agency, see Table 2 summarizing responses to question 13.

[15] See responses to question 17 from agencies in Canada, Jamaica, and the United States.

A few agencies (Singapore, Slovak Republic, and Switzerland) have never investigated a predatory pricing case. Twenty-five respondents have investigated alleged predatory pricing, but either have never challenged such conduct or found price predation in only one or two instances over the past ten years.[16] The European Commission, Bulgaria, and Denmark each found violations in three cases.

Agency decisions were challenged in court twenty-three times. Eight court decisions ruled in favor of the agencies' finding of predation while ten overturned the decision, one case was withdrawn, and four cases are pending.

B. Private cases challenging predatory pricing

Thirty respondents[17] noted that private parties can challenge predatory pricing in court. However, such challenges are rare. Of these respondents, only six (Chile, Denmark, Germany, Peru, United Kingdom, and United States) cited cases initiated by private parties; only the U.S. NGA response indicated that private cases outnumber agency actions. The ABA Section of Antitrust Law's Unilateral Conduct Committee response refers to a 2005 study that found that between 1993 and 2005, at least fifty-seven private predatory pricing cases were initiated in U.S. federal courts. However, in the vast majority of these cases the challenged pricing was found not to be predatory.

Private parties cannot challenge anticompetitive conduct in two jurisdictions (Kenya and Mexico), In Canada, private parties cannot challenge predatory pricing under civil unilateral conduct provisions but can recover damages arising from criminal predatory conduct. In the EU, the Courage v. Crehan ruling of the European Court of Justice (ECJ) further confirmed that it must be open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[18] There is, however, no possibility for a private individual or a company to introduce damage compensation claims before the ECJ or Court of First Instance against the undertakings concerned in competition cases.

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[16] The following agencies either never challenged a price predation case or found price predation in only one or two instances over the past ten years: those of Brazil, Canada, Chile, Czech Republic, France, Germany, Hungary, Ireland, Israel, Italy, Jamaica, Jersey, Kenya, Latvia, Lithuania, Mexico, New Zealand, Norway, Peru, Serbia, South Africa, Taiwan, Turkey, United Kingdom, and United States. The law in Australia has only recently been enacted and there has been no judicial assessment on its interpretation. In Serbia, there are no defined criteria for predatory pricing and so the agency did not respond to questions three to thirteen. The response from the Norwegian agency stated that its practice is harmonized with the EC and therefore it did not respond to questions one to twelve. The Slovak agency did not respond to most questions because it has not investigated any predatory pricing cases.

[17] Australia, Brazil, Bulgaria, Canada (under criminal provision), Chile, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Israel, Italy, Jamaica, Japan, Jersey, Korea, Latvia, Lithuania, New Zealand, Norway, Peru, Russia, Serbia, South Africa, Switzerland, Taiwan, Turkey, United Kingdom, and United States.

[18] According to the ruling, national courts must under certain circumstances allow individuals to claim damages for breach of Community competition law committed by another individual. See Case C-453/99 Courage v. Crehan [2001] ECR I-6297.

II. CRITERIA FOR ABUSE OF DOMINANCE/MONOPOLIZATION BASED ON PREDATORY PRICING

When analyzing predatory pricing cases virtually all responding agencies indicted that prices must be below costs for a violation to occur. Agencies also take into account some or all of the following factors: recoupment of losses, competitive effects, predatory intent, and justifications and defenses. However, the respective weight attributed to each of these factors differs across agencies and cases, as does the way agencies combine and legally assess them. As noted, not all factors are taken into account by all agencies, and the order in which they are examined may also vary depending on the circumstances of the specific case, data availability and access to evidence.

1. Use of Cost Measures or Benchmarks to Demonstrate Loss or Sacrifice

With one exception, all responding agencies use some type of cost measure or benchmark to assess whether the alleged predator is selling at a loss or sacrifice.[19] This reflects policies that above-cost pricing almost invariably constitutes competition on the merits and that enforcers should not penalize discounting in these circumstances.[20]

A. Cost measures employed

There is no single cost measure used by all responding agencies and, as described below, frequently agencies have used more than one measure. The most commonly cited measures are discussed below.[21]

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[19] In Korea, a predatory price has to be below the "normal trade price," not below "cost." Therefore, even if the price is higher than the ATC, it can be predatory as long as the price is lower than the "normal trade price" in the relevant (or similar) market and could lead to the exclusion of competitors. Although there is no clear definition of the normal trade price, it is usually regarded as the price guaranteeing minimal profits in the concerned market. Japan and Russia use cost measures. However, in Japan, in exceptional circumstances, it is also possible to violate the private monopolization law if the firm's prices are above gross cost of sales and constitute "exclusion," taking into account the intent of the firm; in Russia the law also provides for the possibility of using the price of the same product in a different market as evidence of predatory pricing**.** See also note 45. The European Commission explains that the concept of sacrifice is not necessarily linked to a particular cost benchmark. Sacrifice can also be shown by comparing the alleged predatory conduct with conduct that would also have been realistically possible. If the conduct leads in the short term to net revenues lower than could have been expected from reasonable alternative conduct, this means that the dominant firm incurred a loss that could have been avoided. No other responding agency specifically stated any circumstances under which a firm's prices could be considered predatory absent a showing that prices are below a cost benchmark.

[20] The German Bundeskartellamt response explains that according to German courts, undercutting the price of the competition does not in itself constitute unfair hindrance but, on the contrary, is an essential element of healthy competition. As a rule, abusive conduct will, in general, not be found in Germany if, although the competitor's price has been undercut, the pricing strategy applied by the dominant company is still above cost, for example due to economies of scale.

[21] See Table 3. Other cost measures have been used in Lithuania, described as cost price or net costs and production costs. In France, any helpful benchmark can be used in the absence of data to apply the

Marginal cost ("MC") is the increase in total cost attributable to producing the last unit actually produced. MC is almost never used as a benchmark for a number of reasons, including the complexity of its calculation.[22]

Average variable cost ("AVC") is the total variable cost divided by the number of units produced. Variable costs may include items such as materials, fuel, labor, utilities, repair and maintenance, per unit royalties and license fees.[23] Almost all jurisdictions use or have used this measure.

Average avoidable cost ("AAC") consists of the costs that can be avoided by not producing any given number of units divided by that number of units. The Canadian authority uses an avoidable cost test in determining whether prices are predatory on the basis that a firm selling at prices that do not cover its avoidable costs will not be profit-maximizing unless there is an expectation that its pricing policy eventually will create or enhance the firm's market power. Canada considers avoidable costs to be all costs that would be avoided if the firm chose not to produce or sell the relevant product(s) during the period of time the firm engaged in its alleged predatory pricing policy. [24] These costs include:

> i) variable costs such as labor, materials, energy, use-related plant depreciation, promotional allowances, etc.;
> ii) non-sunk, product-specific fixed costs ("quasi-fixed costs"); and
> iii) incremental fixed and sunk costs associated with sales generated by the firm during the period the pricing policy is in place.

Average avoidable cost of incremental output was used in the U.S. Department of Justice's (DOJ) case against American Airlines.[25] In its one case, the Chilean Competition Court wanted to use AAC, but had information only on AVC and therefore

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benchmarks listed below provided it is based on a sound economic analysis. A similar approach is followed by South Africa.

[22] See, e.g., response to question 3.a. from the European Commission and agencies in France, Jersey, and Russia. Israel has not brought any predatory pricing cases, but has identified pricing below MC and AVC as potentially relevant benchmarks. See also responses from agencies in Jamaica, New Zealand, and South Africa.

[23] See response of Crane, Davis, Friedman, citing Areeda & Turner, 88 Harv. L. Rev. at 700; see also response of the U.S. agencies (U.S. courts have struggled with the problem of determining which costs are variable because that depends on the time frame for the analysis and the magnitude of the change in output considered), and Denmark (time horizon taken into account in determining which cost items can be considered fixed and which can be considered variable).

[24] Avoidable costs also may be dependent on the time period considered. See Canadian Bureau response (the longer a pricing policy is in place, the more costs are likely to be considered avoidable as short-run fixed costs become variable in the long run).

[25] United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).

used AVC as a "proxy" for AAC. The UK's OFT has used both AVC and AAC.[26] For the EC, pricing below AAC is used as a starting point in the analysis and in most cases is understood to be a clear indication of conduct that entails a sacrifice (loss). The European Commissionnotes that average avoidable cost may be the same as AVC on the basis that often only variable costs can be avoided.[27]

Long run average incremental cost ("LRAIC") is the sum of the variable and product-specific fixed costs divided by the number of units produced. Long run average incremental cost has been used in addition to other measures to analyze costs of multi-product firms[28] when some costs cannot be uniquely attributed to a particular product.[29] Some agencies[30] consider LRAIC an appropriate benchmark, in particular for industries characterized by high fixed costs and low variable costs, such as telecommunications or postal.[31]

Average total cost ("ATC") is total cost divided by units produced. It equals the sum of AVC plus average fixed cost. Eighteen of the responding agencies use or have used this measure, in addition to other measures, most frequently in addition to AVC tests. [32] See Sections B and C below.

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[26] See also responses from agencies in Brazil, France, Germany, Ireland, Jamaica, Jersey, New Zealand, and South Africa.

[27] According to the European Commission, when AVC and AAC differ, the latter better reflects possible sacrifice. For example, if the dominant firm had to expand capacity to be able to predate, then the sunk costs of this extra capacity should be taken into account in looking at the dominant firm's losses. These costs would be reflected in the AAC, but not the AVC.

[28] The European Commission response explains that in the case of a dominant multi-product firm, single product competitors are considered as efficient only if their costs do not exceed the long run incremental costs of the dominant firm of including this product in its multi-product bundle.

[29] See responses from the French Competition Council and the U.S. agencies.

[30] LRAIC is used by agencies in Brazil, Denmark, European Commission, France, Germany, Ireland, Italy, Jamaica, Jersey, Russia, South Africa, Taiwan, and United Kingdom. Italy also uses average short run incremental cost-the unit cost incurred to produce the alleged predatory increment of output, excluding any non-recoverable costs incurred before the onset of the allegedly predatory behavior.

[31] See *PostDanmark* case: http://www.ks.dk/english/competition/national-decisions/national-decisions-2004/post-danmark-did-not-abuse-a-dominant-position-by-predatory-pricing/. See also European Commission case, *Deutsche Post AG* (COMP/35.141-Unitel Parcel Service/DP AG, 20 March 2001), in which the Commission concluded that the incremental costs comprise only costs incurred in providing a specific parcel service. They do not include the fixed costs incurred by Deutsche Post to provide several services (the common fixed costs).

[32] Agencies that use or have used ATC are those of: Brazil, Czech Republic, Denmark, European Commission, France, Germany, Hungary, Ireland, Italy, Japan, Jersey, Latvia, Mexico, Singapore, South Africa, Turkey, and United Kingdom. France has used this measure in cases of single-product firms.

B. Agencies do not necessarily use the same cost measure in every case

Twenty-one respondents report that the same cost measure is not necessarily applied in all cases.[33]

A number of these agencies use or have used AVC and ATC measures. In Mexico the timeframe for a finding of predation using ATC is longer (systematic pricing) than that under AVC (occasional pricing). Both benchmarks are considered in all cases, but it is enough to show that prices were set below either of them to find predation. Brazil focuses on capacity constraints to determine whether to use AVC or ATC.[34]

Nine responding agencies apply different cost measures depending on whether predatory intent is proven or not.[35] These agencies presume prices are predatory where costs are below AVC, but may also bring a case where the price is between AVC and ATC and there is evidence that the predator had the requisite intention to eliminate a competitor. In Germany, where a clear predatory intent was proven, predatory pricing below total average cost sufficed to substantiate an abuse, but in cases in which the predatory intent is not apparent, a stricter cost measure may be necessary. [36]

The cost measures or benchmarks used generally are not dependent on the industry under investigation.[37] However, some agencies contend that depending on the specific circumstances of the case under investigation, different cost measures may be used in a

[33] Canada, Czech Republic, Denmark, European Commission, France, Germany, Hungary, Italy, Jamaica, Japan, Jersey, Latvia, Lithuania, Norway, New Zealand, Peru, Russia, South Africa, Singapore, Taiwan, and United Kingdom. See also U.S. agencies' response (U.S. courts have used different measures at different times; the U.S. antitrust agencies have not challenged pricing as predatory unless prices fall below some form of avoidable or incremental costs) and responses from agencies in Mexican and Brazil.

[34] In addition, in markets in which there is idle capacity, incremental and avoidable cost measures may be applied in Brazil.

[35] Those of Czech Republic, Denmark, France, Germany, Ireland, Jersey, Singapore, Turkey, and United Kingdom.

[36] Düsseldorf Higher Regional Court, Case Kart 7/02 (V) – Germania, WuW DE-R, 867-875; Bundeskartellamt, decision of 18.2.2002, Case B 9 -144/01 – Lufthansa Germania. See also the EC's response: In *Tetra Pak II* (Tetra Pak II, [1992] OJ L72/1) (manufacturing of aseptic and non-aseptic cartons) the pricing behavior of the dominant company varied over time. The court confirmed the Commission's use of two different cost measures: below AVC (triggering an assumption of predation) and between AVC and ATC (indication of predation when combined with a predatory strategy to eliminate competition). The court recently confirmed this position in its judgment in *France Telecom*, (T-340/03 France Telekom SA v. Commission (under appeal)), where the Commission looked at both pricing well below variable cost and at pricing significantly below total cost, as applied by its subsidiary, Wanadoo, during two distinct time periods.

[37] But see JFTC response, which indicates that the cost measures can vary depending on the industry. The predominant measure used in the retail industry is AVC. See also discussion of LRAIC, above.

particular industry to help determine whether there is predation.[38] For example, the Italian authority explained in its *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana* case, that for some industries a LRAIC cost measure may prove more appropriate. The application of LRAIC to the railway passenger transport sector arose in the French Competition Council's decision in which the Council explored alternative measures of incremental cost.[39]

C. Presumptions and safe harbors

Sixteen responding agencies indicated that pricing below a particular cost measure – usually below AVC – is presumptively predatory.[40] For all but three of these jurisdictions, this presumption is rebuttable and the burden generally shifts to the alleged predator to justify the below cost pricing.[41]

The evidence necessary to rebut a presumption of predation varies among jurisdictions. Some agencies focus on lack of anticompetitive effects of the predatory conduct. Others also list specific commercial reasons as justifications or defenses that can rebut a presumption of predation. For example, in Denmark, a presumption based on prices below cost can be rebutted if the company can show, for instance, that the pricing is limited in time and connected to entry with a new product in the relevant market, the result of destocking of products close to expiry, or a result of significant changes in demand. For further discussion of justifications and defenses, see Section 5, below.

Thirteen agencies report having a safe harbor from a finding of predation for pricing above a particular cost benchmark,[42] which in almost all jurisdictions is ATC. In

[38] In Germany, the significance of the cost measure varies according to the economic characteristics of a market and its products and the circumstances of a case. Düsseldorf Higher Regional Court, Case Kart 7/02 (V) – Germania, WuW DE-R, 867-875; Bundeskartellamt, decision of 18.2.2002, Case B 9 -144/01 – Lufthansa Germania.

[39] Decision dated 23 November 2007 relative to practices implemented in the sector of railway passenger transport on the Paris-London line (the alternative measures explored included the cost of a supplementary time slot, of an additional passenger, or of a supplementary train).

[40]Those of Brazil, Czech Republic, Denmark, France, Germany, Ireland, Italy, Japan, Jersey, Kenya, Mexico, Russia (for commodity markets), Singapore, South Africa, Turkey, and United Kingdom. Some of the responses cite the European court case *Akzo*, which held that a dominant firm has no interest in pricing below AVC except to eliminate competitors to enable it subsequently to raise its price by taking advantage of its monopoly position, because each sale is at a loss. The European Commission and some other agencies agree that pricing below AVC or AAC in most cases is a clear indication of a conduct entailing a "sacrifice," although there are further elements that must be proven to establish liability. See Sections 3 and 4, below.

[41] Czech Republic, Turkey and Russia claim the presumption is irrebuttable.

[42] Those of Brazil, Bulgaria, Canada, Denmark, France, Hungary, Ireland, Italy, Jamaica, Japan (for Unjust Low Price Sales but not Private Monopolization), South Africa, Turkey, and United States.

Canada, pricing above AAC is generally considered within a safe harbor.[43] Another fourteen agencies do not have defined safe harbors, but acknowledged that pricing above ATC is not considered predatory[44] or is unlikely to be predatory except in exceptional cases.[45]

D. Use of price and cost data

ICN members were asked to describe the type of evidence relied on to prove pricing below the relevant cost measure(s). All respondents indicated that they rely on price and cost data of the alleged predator. In Italy, for example, the legal test rests on the dominant firm's cost data and data from other firms are not used. Many agencies also use cost data from other firms.[46] A few respondents stated that they use data from competitors if reliable cost data from the dominant firm is not available (EC, France, Lithuania, and Turkey) or for comparison purposes to test the veracity of the dominant firm's cost data (Ireland, Jamaica, Kenya, New Zealand, South Africa, and Turkey). The European Commision also may use other comparable data, such as industry surveys concerning the industry's efficiency. Data from other firms may be used to show effects.[47] For further discussion of effects see Section 3, below.

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[43] Courts in Italy have found prices above long run incremental costs cannot be considered predatory; in the United States, at least since the Supreme Court's 1993 decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco*, no firm has been found liable for predation if its prices were shown to be above AVC.

[44]Those of Czech Republic, Israel, Kenya, Latvia, Lithuania, Mexico, New Zealand, Peru, and Taiwan.

[45] Predation based on prices above ATC would be "unlikely" in the United Kingdom and Singapore. The European Commission response stated prices above ATC "will normally not constitute an abuse." The German Bundeskartellamt responded that only in an exceptional case was pricing above ATC predatory, citing *Compagnie Maritime Belge*, ECJ, Case C-395/96 P and C-396 [2000] i-1365. Likewise, in Russia, if the price exceeds ATC but is lower than the price of the same product in a similar competitive market, the price can still be found predatory. However, this has not been used as a basis for enforcement in Russia in the last several years.

[46] Agencies in Bulgaria, Canada, EC, France, Germany, Ireland, Jamaica, Japan, Kenya, Korea, Latvia, Lithuania, New Zealand, Peru, South Africa, Switzerland, Taiwan, Turkey, and the United Kingdom use price and cost data of other firms. By contrast, the agencies in Chile, Denmark, Italy, Mexico, Russia, and the United States rely solely on data from the alleged predator. Brazil, Jersey, and Singapore responded that they had no experience with this practice.

[47] For example, in Japan, cost data from other firms may be used to prove the effect of the pricing behavior on competition. In its *GlaxoSmithKline* case, the French Competition Council used evidence that the competitor's bankruptcy was not due to it its own inefficiency as argued by the dominant firm. To demonstrate this, the Council found that the competitor had positive margins in other competitive markets. The Canadian Bureau seeks to obtain appropriate price/cost data from both the alleged predator and the alleged victims, as well as other relevant industry participants. These data are used to determine whether the alleged predator's prices are below the costs of its competitors as well as its own, and that those prices will have the eventual effect of eliminating those competitors. The Canadian Bureau also will examine any available evidence of financial status and projections of future viability from both the predator and its alleged targets. Canada also uses other types of information, such as evidence relating to the issues of whether predation is part of a practice or policy.

E. Comparison between the cost measure and price

For some respondents (Brazil, Chile, Denmark, and Kenya), the only relevant comparison is between the cost measure and the dominant firm's average price for all of its sales in the relevant market. For others this is not necessarily the only relevant comparison.[48] The European Commissionand German Bundeskartellamt responses state that depending on whether the predation strategy is applied by lowering the price for all units sold or only selectively, for example, for units sold to certain customers, the relevant price is the average price over all units or the price for these selected deals. In its most recent case on point, the U.S. Department of Justice compared price with costs on the incremental sales made by the dominant firm.[49] In France, all sales might be taken into account when mass products are sold at the same price. However, in the case of bidding markets in which the dominant firm may implement a targeted submission strategy, the relevant test is to compare individual prices with related costs.[50]

F. The market in which predation occurs

Respondents are divided with regard to whether the alleged predatory pricing must occur in the market in which the firm holds a dominant position or substantial market power. For eleven agencies that responded, to be unlawful the alleged predatory pricing must occur in the market in which the firm holds a dominant position or substantial market power.[51] By contrast, seventeen agencies responded that the dominant firm also may be found liable for predation in other markets in which it lacks dominance/substantial market power.[52]

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[48] European Commission, France, Germany, Ireland, Italy, Jamaica, Japan, Korea, Latvia, Mexico, New Zealand, Norway, Peru, South Africa, Turkey, and United Kingdom.

[49] The Court of Appeals indicated that this could be a valid comparison, although it held that the evidence failed to demonstrate that prices were below cost on the incremental sales. United States v. AMR Corp., 335 F.2d 1109, 1116 (10th Cir. 2003). U.S. courts have not clearly settled this issue. They have consistently held that making a few sales below cost is insufficient to violate the antitrust laws, and they have tended to compare price with costs over the dominant firm's total sales.

[50] The French Competition Council used a disaggregated analysis by product or by service, by comparing costs and prices for each of them. For example, in its *GlaxoSmithKline* decision, the Council rejected the defendant's approach comparing average prices with costs. In this market, hospitals bought medicines using calls for tenders and the Council analyzed each price resulting from the tenders individually. See also responses from New Zealand, South Africa, and Turkey.

[51] Those of Czech Republic, Denmark, Italy, Korea, Latvia, Lithuania, New Zealand, Peru, Russia, Taiwan, and the United States (though the acquisition of monopoly power through predatory pricing would be actionable under U.S. antitrust laws). However, markets in which the predator lacks dominance/significant market power may be relevant if the firm can recoup its losses in those markets. See note 68, below, and accompanying text.

[52] Those of Brazil, Canada, Bulgaria, European Commission, France, Germany (in special circumstances), Hungary, Ireland, Jamaica, Japan, Jersey, Kenya, Mexico, Singapore, Switzerland, Turkey, and United

An approach taken by the European Commissionand agencies in France, Jersey, and the United Kingdom, for example, provides that an abuse may consist of a dominant firm engaging in predatory conduct if it protects or strengthens its dominant position either by predating in the market in which it is dominant, or less commonly, in another, e.g., adjacent market, if that has the effect of protecting or strengthening its position in the dominated market.[53]

In Jamaica, if a firm is found dominant in one market, its conduct in any other market is properly within the scope of an investigation into an abuse of its dominance.[54] This would, for instance, allow the Jamaican agency to investigate firms that are dominant in one market and attempt to leverage their market power into otherwise competitive markets. Likewise, in Hungary, the agency could, for example, challenge a dominant firm leveraging its market power in an upstream market to a downstream market. A few agencies (Brazil, Jersey, Turkey) indicated that, in certain circumstances, it may be considered abusive for a firm with a monopoly in one market to use profits from that market to subsidize predatory prices in another, competitive market.[55]

2. Recoupment

ICN members were asked whether recoupment, the ability to obtain additional profits that more than offset profit sacrifices stemming from predatory pricing, is required for a finding of liability.[56] Guidelines in the Danish annual Competition Report explain that "the dominating company, having ousted other companies from the market, is likely to increase its price in order to recover its losses and perhaps even more. In such cases, the

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Kingdom. In South Africa, the pricing does not necessarily have to occur in the market in which the firm holds a dominant position, but this has not been tested.

[53] See the *Akzo* case, in which Akzo was found to be predating in the market of flour additives to protect its dominant position in the market for organic peroxides. See Case 62/86 AKZO Chemie BV v. Commission [1991] ECR I-3359. See also responses from the French Competition Council (citing *GlaxoSmithKline,* where the firm predated in a market in which it did not have a dominant position to acquire a reputation), and agencies in Jersey and the United Kingdom (the UK response adds that the ability to sustain temporary losses for reasons unrelated to dominance in that market (due to "deep pockets" in general) is not in itself sufficient for a finding of abuse).

[54] See also the response from Singapore (for a finding of infringement it suffices that the undertaking is found dominant in a relevant market and is abusing its dominance in a market in Singapore. For example, an undertaking found to be dominant in a relevant market outside of Singapore, but that abuses that dominance to the detriment of competition in a market in Singapore through predatory pricing, will be subject to the section 47 prohibition).

[55] Jersey's response states that sector specific regulatory powers may be more appropriate than the application only of competition law in instances applicable to legal or protected monopolies.

[56]The Canadian Bureau defines recoupment as an increase in price or decrease in service, choice, quality, or innovation following the elimination or disciplining of competitors.

ultimate loser will be the consumer who will have to live with less competition and higher prices."[57]

Fifteen[58] responding agencies stated that recoupment is a prerequisite to a finding of liability. For eighteen other agencies, the ability to recoup losses is not a requirement, although recoupment can be a relevant factor in the analysis for thirteen[59] of these agencies, whereas the remaining five[60] do not consider recoupment.

A. Recoupment as a requirement

Fifteen responding agencies cited recoupment as a prerequisite to a finding of liability. In the United States, recoupment is deemed the ultimate object of an unlawful predatory pricing scheme. "[I]t is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced."[61] Indeed, some U.S. courts have used the recoupment requirement as an efficient method to dispose of predatory pricing claims without considering whether price was below an appropriate measure of cost.[62] Canada also uses recoupment as a screen (along with price-cost screens) to avoid over-deterrence and chilling legitimate price competition.[63]

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[57] Available at www.ks.dk/english/publications/publications-2004/2004-06-17-competition-report-2004/chapter-6-price-dumping.

[58] Those of Brazil, Canada, Chile, France, Hungary, Ireland (agency practice), Israel, Italy, Jamaica, Mexico, New Zealand, Peru, Switzerland, Taiwan, and United States.

[59] Those of Czech Republic, Denmark, European Commission, Jersey, Latvia, Lithuania, Norway, Russia, Serbia, Singapore, South Africa, Turkey, and United Kingdom. The South African Tribunal described the "logic of predation" as involving circumstances where consumers would ultimately be forced to pay supra-competitive prices in the future following successful predation. The Tribunal did not, however, adopt a formal recoupment test. In Lithuania, evidence indicating a firm's predatory intent, such as detailed calculations on what prices might suffice to eliminate competition or how the losses could be recouped may be relevant. In Turkey, recoupment is an element of an offense, but it has not always been required in practice.

[60] Those of Bulgaria, Germany, Japan, Kenya, and Korea.

[61] *Brooke Group Ltd. v. Brown & Williamson Tobacco*, 509 U.S. 209, 224 (1993).

[62] See *AA Poultry Farms, Inc. v. Rose Acres Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989) (Easterbrook, J.).

[63] See response from the Canadian Bureau to question 17 (the response also notes that the agency has investigated and will continue to investigate allegations of predatory pricing when it appears likely that competition has been or will be lessened or prevented substantially as a result of the practice).

The approach of the Italian Authority focuses on "the overall net impact of the conduct on consumer welfare. [T]he ability of the dominant firm to recover the losses associated with the predatory strategy is crucial to establish an infringement."[64]

B . Recoupment as a relevant factor

In thirteen other jurisdictions recoupment is not a required element of a predatory pricing offense, but can be relevant to the agency's analysis.[65]

The UK agency's reply indicates that although there is no need to prove the possibility of recoupment,[66] it has been addressed in some decisions when evidence showing recoupment was available. The UK response adds that a case may not be brought if, in exceptional circumstances, the dominant firm is able to prove the impossibility of recoupment in a particular case.

The European Court of Justice found that "it would not be appropriate in the circumstances of the present case to require … that [the dominant company] had a realistic chance of recouping its losses, it must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated."[67] The European Commissionstates, however, that recoupment is relevant to the assessment of predation cases under Article 82 EC when examining whether the dominant firm will increase its market power through predatory pricing. The European Commission will examine whether there is a deliberate sacrifice and whether the dominant firm's conduct increases or maintains prices above the anticompetitive level afterwards and thereby harms consumers. The latter reflects likely recoupment.

In Jersey, evidence that the dominant firm would be unable to recoup its losses incurred during the period of predation may be material in determining if the conduct has, or is likely to have, an actual or potential detrimental effect in the market.

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[64]See also the criteria set out by the French Competition Council in its 2004 decision, *AOL v. Wanadoo*: "As to predation, the Council recalls that predation is a tariff practice wherein a dominant operator, sells below its production costs in the aim of eliminating, weakening or disciplining its competitors, retaining the possibility of recovering, in the long term, and in whatever form, the deliberately accumulated losses." French Competition Council response to question two.

[65]See note 59, above.

[66] Competition Appeal Tribunal in *Aberdeen Journals v. Director General of Fair Trading,* Case No. 1009/1/1/02 [2003] CAT 11, paragraphs 436-446, available at http://www.catribunal.org.uk/documents/JdgFinal2AJ230603.pdf. The UK agency's response explains the underlying rationale: "The weakened state of competition on the market on which the undertaking holds the dominant position leads, in principle, to ensuring that losses are recouped. In effect, a finding of predation implies the possibility of recoupment."

[67]ECJ, Case T-333/94P - *Tetra Pak*, [1996] ECR I-5951, paragraph 44; CFI, judgment of 30.1.2007, see also Court of First Instance Case T-340/03-*France Telecom (*formerly *Wanadoo Interactive SA)*, paragraph 226, et seq.

C. Recoupment in a market different than the one in which the predatory pricing took place

Of the eleven agencies that responded, all but one (Switzerland) acknowledge the possibility that recoupment may occur within the same market as the predatory pricing, or in another product or geographic market if the predating firm is able to charge or maintain higher prices in these other markets.[68] The Canadian Competition Bureau assesses whether the alleged predation raises barriers to entry in another market, such as by establishing a "reputation for predation" and thus discouraging future entry. A firm may seek to build a reputation for aggressiveness towards entry in general if it is dominant in one market and, by predating scares off entry in other markets in which it operates.[69] A U.S. court explained that predation may make sense when a monopolist operates in several related markets because "the predator needs to make a relatively small investment (below-cost prices in only a few markets) in order to reap a large reward (supracompetitive prices in many markets)."[70]

D. Respondents analyze recoupment on a case-by-case basis

Eight of fourteen agencies that responded conduct the recoupment assessment separately from the analysis of the firm's market power and below cost pricing, whereas six use an integrated analysis.[71] None of the respondents use a specific recoupment calculation or threshold, nor is there a relevant time period over which the recoupment must occur. As the EC response states, there is no need to "mechanically calculate" actual recoupment. According to the EC, recoupment is more likely if the dominant firm selectively targets specific customers with low prices, as this will limit the dominant firm's losses. By contrast, recoupment is unlikely if the conduct concerns a general price decrease that has already been taking place for a very long period. In some cases, predation may be more

[68]Those of Canada, Chile, EC, France, Jamaica, Peru, United Kingdom, and United States; see also agency responses from Mexico (while having brought no cases, Mexico does not exclude the possibility of recoupment occurring in another market), Italy (cannot exclude the possibility that some complex exclusionary strategies may involve subsidizing deliberately low pricing through additional profits in other markets, however these cases are not treated as predation cases in Italy's experience) and Ireland (the Irish agency does not find it possible except in very closely related markets). The agencies in Brazil, New Zealand, and Taiwan state that they have not yet had any cases relevant to this issue.

[69]See responses from the European Commission and Jamaican agency (the Jamaican response explains that such a situation would arise when the predator offers many products and wants to develop a reputation as a "fighter" in one product market in order to gain additional market power in its other product markets or when a single product firm competes in multiple markets with other firms).

[70]*Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1196 n.4 (3d Cir. 1995); see also *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Pubishing ῾ns, Inc.*, 63 F.3d 1540, 1549 n.6 (10th Cir. 1995) (recognizing that a firm might engage in predation in one market to prevent the target from expanding to compete in a separate market).

[71]Separate analysis: Canada, Ireland, Italy, Jamaica, Mexico, New Zealand, Switzerland, and United States. Integrated analysis: Brazil, Chile, European Commission, France, Peru, and Taiwan.

difficult than expected, resulting in the costs to the dominant firm of predating outweighing its later profits, making recoupment impossible.

In Jamaica, the agency generally must demonstrate that the present value of all anticipated profits during the period of recoupment exceeds the present value of all anticipated costs during the period of predation. In the United States, the Supreme Court in its *Brooke Group* decision held that a recoupment showing "requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market."[72]

The response from the French Competition Council states that the recoupment calculation requires a case-by-case analysis. For instance, in the *GlaxoSmithKline* case (which related to sales of patent-protected drugs to hospitals), the Competition Council was able to demonstrate the actual recoupment of losses on the affected market through a two-step calculation. First, the Council estimated the total loss incurred by the firm during the period of predatory pricing by calculating the difference between the actual volume of sales at predatory prices and the volume that would have resulted from the same sales at purchase prices that were "without commercial margin." The Council then calculated the profits resulting from the swift rising of the prices of the product during the two years following the exit of the main competitor, concluding that these profits amounted to more than four times the estimated losses.[73]

E. Whether recoupment must be probable, possible, or likely

When recoupment is assessed in a specific case, it generally must be probable, possible, or likely, but an agency does not necessarily have to demonstrate that it took place or that initial losses were actually recouped before a finding of predatory pricing can be made.[74]

In Hungary, Ireland, Italy, Jamaica, Mexico, and the United States, the agencies look at the "probability" of recoupment as the benchmark for establishing an infringement. In the United States, there must be a dangerous probability of recouping the investment in below-cost prices. In Hungary it must be "high." The Irish courts likely would insist on recoupment being expected based on the "balance of probabilities."

In Brazil, France, Switzerland, and Taiwan, recoupment must be "possible." In Canada and the EC, when recoupment is assessed it must be "likely."

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[72] 509 U.S. at 225.

[73] In the French Competition Council's *Glaxo Smith Kline* case, paragraph 178 and 189, the possibility of recoupment was raised as a defense by the alleged predator.

[74] The European Commission explains that neither the case law of the Court of Justice nor the decision-making practice of the Commission requires proof that initial losses were actually recouped before a finding can be made of abuse. In Taiwan, the agency needs to prove the predator is able to recoup its losses by raising price after excluding competitors from the market, but it does not have to prove the predator actually collected it loss.

F. Factors considered in assessing recoupment

High barriers to entry are frequently cited as a factor considered in assessing recoupment.[75] In Canada, the Bureau assesses whether existing barriers to entry are high enough such that recoupment will be likely, as well as whether any alleged predation raises barriers to entry. In a Chilean case, the TDLC analyzed market structure to determine whether it was consistent with a profitable application of a predatory strategy by the defendant. The TDLC analyzed the possibility of recoupment through its analysis of threats of entry and market structure.

In the United States, an inquiry is made into potential rewards from excluding competition. The relevant factors the U.S. agencies consider include elements of market structure, particularly barriers to entry, and other factors bearing on the ability to achieve higher post-predation profits.[76]

Finally, three responding agencies raised financial resources as a factor relevant to analyzing recoupment.[77]

3. Effects

ICN members were asked if, in addition to below-cost pricing, effects, such as market foreclosure or consumer harm, must be demonstrated to establish predatory pricing? If this was so, members were asked to explain the types of effects considered.

[75]In France, barriers to entry are a factor in assessing the possibility to recoup, and in Jamaica some of the main factors are barriers to entry, customer switching costs, churn rates, and rates of product innovation. See also Peru (considers the future contestability of the market, change in technology, etc.) and Taiwan (predatory pricing may be beneficial to consumers if low barriers to entry make it unable to prevent competitors from returning or entering the market).

[76]In addition, a key factor in the United States is the total amount apparently sacrificed by selling below cost. If the volume sacrificed is sufficiently large in relation to the size of the market, recoupment is infeasible under any circumstances, and it can be inferred that the aggressive pricing was not an investment in future market power. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574, 592-93 (1986) (observing that recoupment might be impossible when the "alleged losses have accrued over the course of two decades").

[77]Brazil (financial capacity, both of the rivals and the party. and economic profit capacity after rival's exclusion); Italy (financial resources necessary to subsidize the short-term losses caused by the exclusionary behavior, as well as the presence of significant entry barriers are the factors most commonly referred in appraising such probability); Mexico (the CFC presumes recoupment if the alleged predator has sufficient financial strength, excess capacity, or a record of affecting competition or free entry in the markets in which it competes).

A. Whether effects must be demonstrated

Twenty-one responding agencies answered "yes."[78] For example, the Irish response stated that the "impacts on market entry and consumers would always be dealt with" as "harm to consumers must be shown for any abuse to be established." The Canadian response stated that a required element of predatory pricing is that "competition has been, is being, or is likely to be lessened or prevented substantially." The response from Korea stated that for predatory pricing to be an abuse, "it has to be proven whether an exclusion of competitors can be caused, in addition to the fact that the price was set at a level lower than the normal trade price." The Russian response stated that under its law concerning predatory pricing of commodities, "[t]he commodity price is not recognized monopolistically low if its establishment has not resulted in restriction of competition because of reduction of the number of economic entities[.]" The French Competition Council response stated that the fact that the pricing is below costs and that it is part of a foreclosure strategy is sufficient to establish an infringement; however, the economic approach of the Competition Council also assesses the potential or actual effects of the practice. The EC response states that the test for predation requires an assessment of whether the conduct is likely to enable the dominant firm to maintain or increase its market power (thus harming consumers) and recoup its sacrifice.

Nine agencies answered "no."[79] Several jurisdictions (for example, Denmark, Germany, Mexico, and New Zealand) indicated that even if an agency does not consider market effects as part of its prima facie analysis, evidence of a lack of detrimental market effects is potentially relevant. For example, the New Zealand response states that while the criteria for establishing predatory pricing are primarily focused on the form of the conduct, these criteria are based on theories of harm and such matters could be taken into account by the courts which have recognized that harm to consumers arises from the ability of dominant firms to subsequently recoup losses through raising prices. Two agencies (New Zealand and Norway) indicated that even if market effects were not necessary to establish predatory pricing, the extent of effects (or lack thereof) may be relevant in determining the appropriate penalty.

Two qualifications concerning market effects should be noted. First, some jurisdictions (e.g., Mexico and South Africa) indicated that for prices shown to be below a firm's AVC, predatory pricing may either be presumed without proof of market effects, or the need to show market effects in such circumstances may not be as important as when prices are above average variable costs. As NGA Gerwin Van Gerven states with respect to EC competition law:

[78] Those of Brazil, Canada (for civil cases), Chile, Czech Republic, European Commission, France, Hungary, Ireland, Italy, Jamaica, Japan, Jersey, Korea, Latvia, Norway, Peru, Russia, South Africa (for conduct evaluated under 8(c)), Taiwan, United Kingdom, and United States.

[79] Those of Bulgaria, Denmark, Germany, Kenya, Lithuania, Mexico, New Zealand, Switzerland, and Turkey.

> If there is direct evidence of a strategy or plan to foreclose (or it may be legally presumed that such strategy exists), it will be assumed that such foreclosure is likely and then consumer harm will follow. If there is . . . only indirect evidence, and if the pricing behaviour only makes sense as part of a predatory strategy and there are no other reasonable explanations that will normally suffice to show a strategy to predate. In such a case it will not be necessary to show that a foreclosure effect is likely. In all other cases, it will be necessary to show that a foreclosure effect is likely in view of the scale, duration and continuity of the below-cost pricing before predatory pricing can be found to exist.

Second, most jurisdictions stated that proof of actual market effects is not necessary so long as there is evidence of likely detrimental effects. As summarized in the response from Italy, it is not necessary for exclusion of the competitor to actually take place, provided it can be shown that the pricing behavior under scrutiny is capable of excluding an as-efficient competitor and harm consumers. Similarly, the Bulgarian agency's response states that proof of actual market effects is not necessary as long as there is evidence of the potential or possibility of detrimental effects.

B. Types of effects

As for the types of market effects considered, the most commonly indicated was evidence of an actual or likely exclusion or foreclosure of competitors. The EC response stated that actual exit of competitors is not necessary so long as they are weakened, and that consumer harm is seen as resulting from that weakening: "[Foreclosure] can occur even if the foreclosed competitors are not forced to exit the market. Foreclosure is considered anticompetitive if it hinders competition on the market and thereby harms consumers." Six agencies[80] also indicated, however, that they will consider exclusion only to the extent that it applies to firms that are as efficient as, or more efficient than, the dominant firm. For example, in addition to other factors generally assessed in exclusionary conduct cases, the European Commission, where data are available, applies the as efficient competitor test as an initial screen to identify whether the conduct is capable of being abusive.[81] Other jurisdictions indicated that evidence of increased barriers to entry or expansion also are market effects that can arise from predatory pricing.

Some agencies indicated that consideration of the scale of allegedly below-cost sales, or the duration or continuity of the conduct, should be considered, thereby indicating that a finding of predatory pricing is not appropriate in circumstances in which there are no market effects.

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[80] European Commission, France, Italy, Jamaica, Singapore, and Taiwan.

[81] The relevant question is whether the dominant firm itself, without its demand-related advantages, would be able to survive the alleged exclusionary price-based conduct, if it were the target of such conduct.

Other agencies indicated that they consider evidence of a risk of higher prices, the prevention of price decreases that may have otherwise occurred, or the feasibility of recoupment. Finally, the agencies in France and Latvia indicated that they will consider the ability of other firms or customers to effectively counteract a dominant firm's predatory strategy.

4. Intent

ICN members were asked whether a firm's intent is relevant in predatory pricing cases. Twenty-four responding agencies indicated that intent is relevant, while seven agencies responded that intent is neither a requirement nor a relevant factor.[82] Thus, for example, the Korean response stated that the firm's intent is an important factor for determining the possibility of competitor exclusion. By contrast, in South Africa, effect, and not intent, is relevant. For those jurisdictions in which intent was identified as relevant, members were asked to describe the relevant types of intent and the evidence used to show the requisite intent.

A. When intent is relevant

For nine jurisdictions in which intent is relevant, intent must be demonstrated when prices are between AVC and ATC. As discussed in Section II.1.B, these agencies presume the alleged predator possessed the requisite intent when prices are below the relevant cost measure – generally AVC. When prices are between AVC and ATC, these agencies also may bring a case if proof of intent is demonstrated.[83] For example, the Jersey response mentioned that prices falling between AVC and ATC for short-run periods can be perceived as legitimate competition. However, if prices were set at this level as part of a strategy to eliminate a competitor, this conduct could be considered abusive.

In some jurisdictions, e.g., Canada and Taiwan, intent is a required element in all predatory pricing cases. For example, the Canadian response indicated that in addition to demonstrating below cost pricing and recoupment, civil predatory pricing cases, like all abuse of dominance cases in Canada, must have "an intended negative effect on a competitor that is exclusionary, disciplinary, or predatory."

[82] Intent is relevant in Brazil, Bulgaria, Canada, Czech Republic, Denmark, European Commission, France, Germany, Ireland, Japan, Jersey, Kenya, Korea, Latvia, Lithuania, Mexico, New Zealand, Norway Peru, Singapore, Switzerland, Taiwan, Turkey, and United Kingdom. Intent is neither relevant nor required in Chile, Hungary, Italy, Jamaica, Russia, South Africa, and the United States. However, in Italy, intent is relevant for the quantification of applicable fines.

[83] See note 35.

Rarely is intent relevant if objective conditions for predatory pricing are not met. There was near consensus among respondents that if pricing is above the relevant benchmark there is no predation and an assessment of intent is unwarranted.[84]

B. Types of predatory intent

Respondents identified different types of intent. The most commonly cited is the intent to eliminate a competitor.[85] For example, the Danish agency's response states that the agency will review "the clear intent to eliminate a competitor" and the Kenyan agency described intent such as "to induce a competitor to sell assets or to merge; … to shut down; [or] desist from producing or trading."

In the European Commission's analysis, the concept of abuse is an objective one (no finding of an abuse based on intent only). However, the Commission looks for internal documents or business plans of the dominant firm that suggest a predatory strategy, such as a detailed plan to sacrifice in order to exclude a rival, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of predatory action. Such proven intent to weaken competition may be relevant when looking at the likely effects of the conduct, and recoupment.

In addition to excluding a competitor, the Mexican agency also cited other types of intent, including the intent to substantially hinder access to the market. Singapore looks generally at intent to harm competition.

C. Proving intent through direct and indirect evidence

Documentary evidence, when available, may be used to determine whether a firm intended to predate. For example, in Korea, "if internal documents evidently show that the act was aimed at excluding rival enterprises, they can be used as critical evidence for proving illegality of the act." In Lithuania, documentary evidence that indicates a firm's predatory intentions, such as detailed calculations on what prices might have the effect of eliminating competition or how the losses could be recouped are relevant and important. In addition to direct documentary evidence, the United Kingdom, for example, considers witness testimony to be relevant evidence.[86]

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[84] But see the response from Japan (in Japan, it is possible to violate the law with prices above the gross cost of sales that constitute "exclusion " in cases of "private monopolization" as opposed to "unfair trade practices" when taking into account the intent of the firm in exceptional circumstances).

[85] Bulgaria, Canada, Denmark, France, Germany, Jersey, Kenya, Latvia, Lithuania, Mexico, Turkey (intent to drive competitors out of the market or prevent new entry), Taiwan, and United Kingdom.

[86] Similarly, in France, the Competition Council explains that proof of intent may be found in documents, notes or even material elements clearly showing the predatory intent, which may be corroborated, for example, by evidence that the predatory prices were limited to customers likely to switch to a competing supplier. The EC response notes that in some cases it will be possible to rely upon direct evidence of a predatory strategy consisting of documents from the dominant firm. Such evidence needs to be sufficiently clear about the predatory strategy and, for example, indicate the specific steps the dominant firm is taking.

Absent direct evidence, indirect evidence inferred from the dominant firm's conduct also may be used by some agencies to demonstrate intent (e.g., EC, France, New Zealand, and the United Kingdom).[87] The United Kingdom looks at behavioral evidence, such as targeting price cuts against a competitor; the frequency of cuts (e.g., a pattern of aggressive pricing); the likelihood of elimination – e.g., the scale of the strategy, the "deep pockets" of the alleged predator, and whether the dominant company has the capacity to absorb the increased output also may provide some evidence of predatory intent.[88]

Finally, in some responding jurisdictions (e.g., Peru, Latvia, and the United Kingdom), the requisite intent also may be found when the dominant firm's conduct makes "no commercial sense" or lacks "objective justification." For example, in the United Kingdom the requisite intent will be inferred when the pricing strategy makes commercial sense only because it eliminates a competitor. Similarly, in Latvia, intent could be presumed when there is no objective justification for the dominant firm's action.[89] Justifications and defenses are discussed in Section 5, below.

5. Justifications and Defenses

In many responding jurisdictions it is accepted that a valid business, objective, proper or efficiency justification or legitimate commercial reasons may operate as a defense in predatory pricing cases or preclude an initial finding of predation.[90] Some responses stated that no justifications or defences are permitted for predatory pricing.[91] In two of these jurisdictions, however, it is accepted that justifications might be raised to demonstrate that the dominant firm did not have the requisite intent to abuse its dominant position.[92]

[87] See also the Canadian response explaining whereas evidence of subjective intent can be used to establish an overall anticompetitive purpose, under Canadian law proof of subjective intent is not necessary because firms are assumed to intend the reasonably foreseeable effects of their actions.

[88] See also Danish response (the duration of the predatory pricing and thereby the duration of the losses incurred by the dominant company can be taken into account when establishing predatory intent).

[89] In France, proof also may stem from the absence of alternative economic justifications to the practice, its duration, the firm's ability to recoup losses, and characteristics of the target (e.g., whether it is an easy target because of limited finances or its size).

[90] See, e.g., Brazil, Bulgaria, Canada, Chile, Denmark, European Commission, France, Germany, Hungary, Ireland, Italy, Jamaica, Japan, Korea, and Mexico.

[91] See, e.g., Czech Republic, Kenya, Russia, and Serbia.

[92] Czech Republic and Kenya.

In some jurisdictions no answer is provided to the question of whether a justification or defence is permitted, perhaps because the issue had not yet been considered in those jurisdictions.[93]

A. The use of justifications and defenses

In some jurisdictions valid business justifications explaining the overall purpose of the alleged predatory practice are considered.[94] Where such a justification is established, it may be found that the conduct was not undertaken for anticompetitive purposes, that the dominant firm has not taken advantage of its market power for an anticompetitive purpose or that the alleged predator did not have a predatory intent.[95] In Canada, a valid business justification has been defined as a credible efficiency or pro-competitive rationale for the conduct, which is attributable to the firm and counterbalances anticompetitive effects and/or subjective intent of the acts.

In Japan it is stated that a "proper justification" for the alleged predatory pricing may operate as a defense in predatory pricing cases.

In some jurisdictions objective justification provides a general defense for abusive behavior.[96] The EC response stated that although objective justification provides a general defense in dominance cases, it would not provide a defense in predation cases if a sacrifice has been established. The fact that the dominant firm made a sacrifice implies that it had other, more profitable, alternatives, which it has chosen not to pursue. The UK response stated that the defense is unlikely to apply where predatory intent has been proved. It is most likely to provide a defense therefore where intent has been presumed rather than demonstrated (in cases where pricing is below AVC).

In some jurisdictions it is possible to make efficiency defense arguments. [97]

In some jurisdictions it is accepted that a presumption of predation created by pricing below a particular cost benchmark can be rebutted if the company can show, e.g., that pricing is limited in time, connected to new entry and/or due to destocking of products close to expiry.[98]

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[93] See, e.g., Latvia and Lithuania.

[94] See, e.g., Canada, New Zealand.

[95] See, e.g., Czech Republic, Japan, and Turkey.

[96] See e.g., Bulgaria, EC, Germany, Italy, United Kingdom.

[97] See, e.g., European Commission, France, Germany, Hungary, Italy, Jamaica, Korea, Mexico, Peru, and South Africa.

[98] See, e.g., Denmark.

The Chilean response indicated that although no specific defenses apply in a predation case, cases are analyzed on a rule of reason basis, so that all the relevant factors that might be available might be considered. This suggests that in this jurisdiction procompetitive/ business justifications may be raised and that valid justifications will be weighed against anticompetitive effects prior to an infringement being found.

B. Examples of justifications

The following are examples of justifications which jurisdictions indicate may be relied upon to justify or defend a predatory pricing claim:

- the price is a promotional one (e.g., Singapore), or is necessary to persuade consumers to switch;

- the price reduction is necessary to penetrate a new market *(*e.g., France), launch a new product (e.g., South Africa), or build up the necessary economies of scale to become profitable (e.g., United Kingdom);

- the firm is loss leading for complementary products or services (i.e., to boost demand and profits in a complementary product or service) (e.g., New Zealand);

- the price is simply lining up on a low price level in a price war situation (e.g., France and Switzerland);

- there is a need to adapt to a sudden change of market conditions, for example: the firm is liquidating excess, obsolete or perishable products (e.g., Canada); there has been a significant change in demand and pricing below cost may be necessary to maintain presence in the market (e.g., Singapore);

- a low price strategy allows the firm to reduce cost production by a 'learning by doing' effect (e.g., France);

- the products are being sold off because they are damaged, part of an incomplete set or impaired (e.g., Japan).

C. Meeting competition

A number of jurisdictions have a meeting competition defense, which may allow firms to match a competitor's price reduction even if it is below the relevant measure of cost.[99]

The Canadian Competition Bureau's response states that it takes account of the quality of the product or service when applying the defense. Where one product is superior to another in terms of quality or service, price matching may constitute undercutting.

[99] See, e.g., Brazil, Bulgaria, Canada, Denmark, France, Mexico, New Zealand, and South Africa.

The French Competition Council specifically states that it requires such responses to be proportionate.

The response from Japanese agency notes that meeting competition does not constitute a proper justification for alleged predatory behavior if it causes difficulty to the business activities of its rivals.

D. Burden of proof

In many jurisdictions that responded the burden of proof appears to be on the party seeking to justify the behavior to establish the existence of the justification or efficiency.[100] For example, in Brazil, justifications must be demonstrated sufficiently, i.e., that they are likely and probable. In the EC it must be demonstrated that they will be (or have been) realized with a sufficient degree of probability. In France, a higher standard of proof is required when there is a presumption of predation because prices are fixed below variable costs than in cases where prices are between AVC and ATC .

In some jurisdictions the onus is on the party seeking to justify the behavior to demonstrate not only the benefits have been (will be) realized but also that they will outweigh the harm resulting from predatory behavior, for example: (1) that the conduct is indispensable to achieve the efficiencies, the efficiencies outweigh the likely negative effects on competition and consumer welfare and that the conduct does not eliminate competition by removing most or all existing sources of actual or potential competition in the relevant market (EC); (2) that the conduct is proportionate to the benefits produced and no more restrictive than necessary (e.g., Singapore); (3) that the efficiency gains and consumer welfare increases substantially offset the competition-restricting effect (e.g., Korea); and/or (4) that the efficiency or pro-competitive rationale for the conduct is attributable to the firm and counterbalances anticompetitive effects and/or subjective intent of the acts (Canada).

In some jurisdictions the burden shifts back to the claimant once the justifications have been raised. For example, the UK response states that once the dominant firm has shown an objective justification for the allegedly abusive conduct, the burden falls once more on the claimant or the investigating agency to prove the absence of objective justification. In South Africa whether or not the burden of proof shifts back depends upon whether the conduct falls within the scope of a list of specific types of exclusionary conduct, or whether is caught only by a general "catch-all" prohibition on exclusionary conduct. In the former case the burden is on the dominant firm to establish that the technical, efficiency or other pro-competitive gains outweigh the anticompetitive effect. In the latter case, however, the onus is on the claimant to establish that the anti-competitive nature of the predatory behavior outweighs the technological, efficiency or other pro-competitive gains raised by the respondent.

[100] See e.g., Brazil, Canada, Chile, EC, Denmark, Korea, Mexico, Peru, and United Kingdom.

In New Zealand, the defense is applied through the application of a 'counterfactual test.' In this jurisdiction a causal relationship must be shown between the allegedly anticompetitive conduct and its dominance or market power (i.e. that the firm has taken advantage of its market power for an anticompetitive purpose). If a dominant firm is acting as a non-dominant firm otherwise in the same position would have acted in a market which was competitive it cannot be said to be using its dominance to achieve the purpose that is prohibited. There is therefore a range of price cutting that could occur in a competitive market that may not contravene the prohibition (e.g., promotional pricing, loss leaders for complementary products or services, meeting competition, clearance of old stock or excess products). In this jurisdiction the normal civil standard of proof applies and the burden is on the plaintiff to show a causal connection between the alleged anticompetitive conduct and the requisite market power.

Annex to the Report on Predatory Pricing[i]

Table 1 Summary Table

		Does Price have to be below a cost measure?	Below AVC	Below AAC	Below ATC	Other Measure of Cost	Safe Harbor above a particular benchmark?	Could price above ATC ever be predatory?	Presumption below a particular benchmark?	Is Recoupment required?	Recoupment not required but a factor considered.	Is intent relevant?	Are effects required, such as market foreclosure or consumer harm?	Are justifications or defenses permitted?
Questionnaire		3.a.	3.a.i.	3.a.i.	3.a.i.	3.a.i.	8	3.e.	7	9	9	10	11	12
1	Brazil	YES	YES	YES	YES	X	YES	NO	YES	YES		YES	YES	YES
2	Bulgaria	YES	X	X	X	X	YES	X	NO	NO	X	YES	NO	
3	Canada	YES		YES	NO		YES	NO	NO	YES		YES	NO	YES
4	Chile	YES	YES	YES	X	X	NO	X	NO	YES	YES	NO	YES	YES
5	Czech Republic	YES	YES	NO	YES	NO	NO	NO	YES	NO	YES	YES	YES	YES
6	Denmark	YES	YES	NO	YES	NO	YES	NO	YES	NO	YES	YES	NO	YES
7	European Commission	YES	YES	YES	YES	X	NO	NO	NO	NO	YES	NO	YES	YES
8	France	YES	YES	YES	YES	YES	YES	NO	YES	YES	X	YES	YES	YES
9	Germany	YES	YES	YES	YES	X	NO	YES	YES	NO	NO	YES	YES+NO	YES
10	Hungary	YES	YES	X	YES	X	YES	NO	NO	YES	YES	NO	YES	YES
11	Ireland	YES	YES	YES	YES	NO	YES	NO	YES	YES	X	YES	YES	YES
12	Israel	YES	YES	X	X	X	X	NO	X	YES	X	X	X	X
13	Italy	YES	YES	X	YES	YES	YES	NO	YES	YES	X	NO	YES	YES
14	Jamaica	YES	YES	YES	NO	X	YES	NO	NO	YES	X	NO	YES	YES

		Does Price have to be below a cost measure?	Below Average Variable Cost	Below Average Avoidable Cost	Below Average Total Cost	Other Measure of Cost	Safe Harbor above a particular benchmark?	Could price above ATC ever be predatory?	Presumption below a particular benchmark?	Is Recoupment required?	Recoupment not required but a factor considered.	Is intent relevant?	Are effects required, such as market foreclosure or consumer harm?	Are justifications or defenses permitted?
15	Japan	YES	YES	X	YES	X	YES	NO	YES	NO	X	YES	YES	YES
16	Jersey	YES	YES	YES	YES	X	NO	X	YES	NO	YES	YES	YES	YES
17	Kenya	YES	YES	X	X	X	NO	NO	YES	NO	NO	YES	NO	NO
18	Korea	NO	X	X	X	X	NO	YES	NO	NO	X	YES	YES	YES
19	Latvia	YES	YES	X	YES	X	NO	NO	NO	NO	YES	YES	YES	X
20	Lithuania	YES	X	X	X	YES	NO	NO	NO	NO	YES	YES	NO	X
21	Mexico	YES	YES	NO	YES	NO	NO	NO	YES	YES	X	YES	NO	YES
22	New Zealand	YES	YES	YES	X	X	NO	NO	NO	YES	X	YES	NO	YES
23	Norway[ii]	X	X	X	X	X	X	X	X	X	X	X	X	X
24	Peru	YES	YES	X	X	X	NO	NO	X	YES	X	YES	YES	YES
25	Russia	YES	YES	NO	NO	YES	NO	YES	YES (for commodities)	NO	YES	NO	YES	NO
26	Serbia	X	X	X	X	X	X	X	X	X	X	X	X	X
27	Singapore	YES	YES	NO	YES	X	X	X	YES	NO	YES	YES	YES	YES
28	Slovak Republic[iii]	X	X	X	X	X	X	X	X	X	X	X	X	X

		Does Price have to be below a cost measure?	Below Average Variable Cost	Below Average Avoidable Cost	Below Average Total Cost	Other Measure of Cost	Safe Harbor above a particular benchmark?	Could price above ATC ever be predatory?	Presumption below a particular benchmark?	Is Recoupment required?	Recoupment not required but a factor considered.	Is intent relevant?	Are effects required, such as market foreclosure or consumer harm?	Are justifications or defenses permitted?
29	South Africa	YES	YES	YES	YES	YES	YES	NO	YES	NO	YES for section 8(c)	NO	NO for section 8(d)(iv)/ YES for section (c)	YES
30	Switzerland	YES	YES	X	X	X	NO	X	NO	YES	X	YES	NO	YES
31	Taiwan	YES	YES				NO	NO	NO	YES	X	YES	YES	YES
32	Turkey	YES	YES	X	YES	X	YES	NO	YES	NO	YES	YES	NO	YES
33	United Kingdom	YES	YES	YES	YES	X	NO	YES	YES	NO	YES	YES	X	YES
34	United States	YES	YES	YES	NO	NO	YES	NO	NO	YES	X	NO	YES	YES

Table 2 Enforcement Statistics in Agency Responses

		Number of PP investigations	Number of cases where violation found	Number of cases where no violation found	Number of agency decisions challenged on appeal	Number affirmed	Number overturned	Can private parties challenge predatory conduct?	Is predatory pricing civil, criminal or both?
Questionnare		13.a	13.b.	13.c.	13.d	13.d	13.d	14	15
1	Brazil	26	0	26	X	X	X	YES	BOTH
2	Bulgaria	6	3	3	3	1	2	YES	CIVIL
3	Canada	3	1	2	1	withdrawn		NO for civil YES for criminal	BOTH
4	Chile	1	0	1	1	0	1	YES	CIVIL
5	Czech Republic	1	0	1	0	0	0	YES	CIVIL
6	Denmark	6	3	3	0	X	X	YES	BOTH
7	European Com.	X	3	X	2	1	1 partly	NO	CIVIL
8	France	11	1	10	4 (1 pending)	1	2	YES	BOTH
9	Germany	1	1	X	1	1	X	YES	CIVIL
10	Hungary	8	0	8	0	0	0	YES	CIVIL
11	Ireland	2	0	2	X	X	X	YES	BOTH
12	Israel	2	0	2	X	X	X	YES	BOTH
13	Italy	2	1	1	1	1	0	YES	CIVIL
14	Jamaica	4	0	4	0	0	0	YES	CIVIL
15	Japan	X	2	0	1 (pending)	0	0	YES	BOTH
16	Jersey	1	0	1	0	0	0	YES	CIVIL
17	Kenya	4	0	4	0	X	X	NO	CRIMINAL
18	Korea	139	19	99	2	1	1	YES	BOTH
19	Latvia	1	0	1	0	0	0	YES	CIVIL
20	Lithuania	2	1	1	0	0	0	YES	CIVIL

		Number of PP investigations	Number of cases where violation found	Number of cases where no violation found	Number of agency decisions challenged on appeal	Number affirmed	Number overturned	Can private parties challenge predatory conduct?	Is predatory pricing civil (1), criminal (2) or both (3)
21	Mexico	3	1	2	1	0	1	NO	CIVIL
22	New Zealand	19	1	18	1	0	1	YES	CIVIL
23	Norway	5	1	4	1	0	1	YES	CIVIL
24	Peru	3	0	2	0	0	0	YES	BOTH
25	Russia	X	X	X	X	X	X	YES	CIVIL
26	Serbia	1	1	0	0	X	X	YES	CIVIL
27	Singapore	0	0	0	0	0	0	X	CIVIL
28	Slovak Republic	0	0	0	0	0	0	X	X
29	South Africa	0	1	0	X	X	X	YES	CIVIL
30	Switzerland	0	0	0	0	0	0	YES	CIVIL
31	Taiwan	9	0	9	0	0	0	YES	BOTH
32	Turkey	3	1	2	2 (pending)	X	X	YES	CIVIL
33	United Kingdom	X	2	9	2	2	X	YES	CIVIL
34	United States	2	N/A	2	N/A	0	0	YES	CIVIL

Table 3 Measures of Cost Identified in Agency Responses

		Does price have to be below a cost measure?	Below Marginal Cost	Below Average Variable Cost	Below Average Avoidable Cost	Below Long Run Average Incremental Cost	Below Average Total Cost	Other Measure of Cost	Is the same cost measure applied in all cases?	Safe Harbor above a particular benchmark?	Could price above ATC ever be predatory?	Presumption below a particular benchmark?	Is the presumption rebuttable?	Must predation occur in dominant market?
Questionnaire		3.a.	3.a.i.	3.a.i.	3.a.i.	3.a.i.	3.a.i.	3.a.i.	3.c.	8	3.e.	7		4
1	Brazil	YES	NO	YES	YES	YES	YES	X	YES	YES	NO	YES	YES	NO
2	Bulgaria	YES	X	X	X	X	X	X	YES	YES	X	NO		NO
3	Canada	YES			YES				YES	YES	NO	NO		YES
4	Chile	YES	X	YES	YES	X	X	X	YES	NO	X	NO		TDLC Yes S.Ct No
5	Czech Republic	YES	NO	YES	NO	NO	YES	NO	NO	NO	NO	YES	NO	YES
6	Denmark	YES	NO	YES	NO	YES	YES	NO	NO	YES	NO	YES	YES	YES
7	European Com.	YES	NO	YES	YES	YES	YES	X	NO	NO	NO	NO		NO
8	France	YES	YES	YES	YES	YES	YES	YES	NO	YES	NO	YES	YES	NO
9	Germany	YES	X	YES	YES	YES	YES	X	NO	NO	YES	YES	YES	NO
10	Hungary	YES	X	YES	X	X	YES	X	NO	YES	NO	NO		NO
11	Ireland	YES	NO	YES	YES	YES	YES	NO	YES	YES	NO	YES	YES	NO
12	Israel	YES	YES	YES	X	X	X	X	X	X	NO	X	X	X
13	Italy	YES	X	YES	X	YES	YES	YES	NO	YES	NO	YES	YES	YES
14	Jamaica	YES	YES	YES	YES	YES	NO	X	NO	YES	NO	NO		NO
15	Japan	YES	X	YES	X	X	YES	X	NO	YES	NO	YES	YES	NO
16	Jersey	YES	X	YES	YES	YES	YES	X	NO	NO	X	YES	YES	NO
17	Kenya	YES	X	YES	X	X	X	X	YES	NO	NO	YES	YES	NO
18	Korea	NO	X	X	X	X	X	X	X	NO	YES	NO		YES

		Does price have to be below a cost measure?	Below Marginal Cost	Below Average Variable Cost	Below Average Avoidable Cost	Below Long Run Average Incremental Cost	Below Average Total Cost	Other Measure of Cost	Is the same cost measure applied in all cases?	Safe Harbor above a particular benchmark?	Could price above ATC ever be predatory?	Presumption below a particular benchmark?	Is the presumption rebuttable?	Must predation occur in dominant market?
19	Latvia	YES	X	YES	X	X	YES	X	NO	NO	NO	NO		YES
20	Lithuania	YES	X	X	X	X	X	YES	NO	NO	NO	NO		YES
21	Mexico	YES	NO	YES	NO	NO	YES	NO	NO	NO	NO	YES	YES	NO
22	New Zealand	YES	YES	YES	YES	X	X	X	NO	NO	NO	NO		YES
23	Norway*	X	X	X	X	X	X	X	X	X	X	X	X	X
24	Peru	YES	X	YES	X	X	X	X	NO	NO	NO	X	X	YES
25	Russia	YES	NO	YES	NO	YES	NO	YES	NO	NO	YES	YES (for commodities)	NO	YES
26	Serbia	X	X	X	X	X	X	X	X	X	X	X	X	X
27	Singapore	YES	NO	YES	NO	NO	YES	X	NO	X	X	YES	YES	NO
28	Slovak Republic*	X	X	X	X	X	X	X	X	X	X	X	X	X
29	South Africa	YES	YES	YES	YES	YES	YES	YES	NO	YES	NO	YES	YES	NO
30	Switzerland	YES	X	YES	X	X	X	X	X	NO	X	NO		NO
31	Taiwan	YES	X	YES	X	YES	X	X	[NO]	NO	NO	NO	NO	YES
32	Turkey	YES	X	YES	X	X	YES	X	YES	YES	NO	YES	NO	NO
33	United Kingdom	YES	X	YES	YES	YES	YES	X	NO	NO	YES	YES	YES	NO
34	United States	YES	X	YES	YES	NO	NO	NO	NO	YES	NO	NO		YES

Table 4 Recoupment

		Is recoupment required?	Recoupment not required but a factor considered.	Is the assessment conducted separately?	Is there a specific recoupment calculation?	Is there a time period for recoupment?	Can recoupment occur in a different market?	What degree of likelihood of recoupment is required?
Questionnaire		9	9	9.a.	9.c.	9.d.	9.e.	9.f.
1	Brazil	YES		NO	NO	NO	X	Possibility
2	Bulgaria	NO	NO					
3	Canada	YES		YES	NO	NO	YES	Likely
4	Chile	YES		NO	NO	NO	YES	X
5	Czech Republic	NO	YES	X	X	X	X	X
6	Denmark	NO	YES	X	X	X	X	
7	European Com.	NO	YES	NO	NO	NO	YES	Likely
8	France	YES		NO	NO	NO	YES	Possible
9	Germany	NO	NO					X
10	Hungary	YES		X	X	X	X	Probable
11	Ireland	YES		YES	NO	NO	NO	Balance of Probabilites
13	Israel	YES		X	X	X	X	X
12	Italy	YES		YES	NO	NO	NO	Probability
14	Jamaica	YES		YES	NO	NO	YES	Probable
15	Japan	NO	NO					X
16	Jersey	NO	YES	X	X	X	X	X
17	Kenya	NO	NO					
18	Korea	NO	X	X	X	X	X	X
19	Latvia	NO	YES	X	X	X	X	X
20	Lithuania	NO	YES	X	X	X	X	X
21	Mexico	YES		YES	NO	NO	X	Probability
22	New Zealand	YES		YES	NO	NO	X	X

		Is recoupment required?	Recoupment not required but a factor considered.	Is the assessment conducted separately?	Is there a recoument calculation ?	Is there a time period for recoupment?	Can recoupment occur in a different market?	What degree of likelihood of recoupment is required?
23	Norway	X	X	X	X	X	X	X
24	Peru	YES		NO	NO	NO	YES	X
25	Russia	NO	YES	X	X	X	X	
26	Serbia	NO	YES	X	X	X	X	X
27	Singapore	NO	YES	X	X	X	X	X
28	Slovak Republic	X	X	X	X	X	X	X
29	South Africa	NO	YES	X	X	X	X	X
30	Switzerland	YES		YES	NO	NO	NO	Possibility
31	Taiwan	YES		NO	NO	NO	X	Possibility
32	Turkey	NO	YES	X	X	X	X	X
33	United Kingdom	NO	YES	X	X	X	YES	X
34	United States	YES		YES	NO	NO	YES	Dangerous Probability

Table 5 Types of Evidence Relied on, Intent, and Effects

		Is dominant firm's cost data used?	Is cost data of other firms used?	Is intent relevant?	Are effects required, such as market foreclosure or consumer harm?
Questionnaire		6.a.i	6.b.	10	11
1	Brazil	YES	X	YES	YES
2	Bulgaria	YES	YES	YES	NO
3	Canada	YES	YES	YES	YES (civil cases)
4	Chile	YES	NO	NO	YES
5	Czech Republic	YES	X	YES	YES
6	Denmark	YES	NO	YES	NO
7	European Com.	YES	YES	YES	YES
8	France	YES	YES	YES	YES
9	Germany	YES	YES	YES	YES+NO
10	Hungary	X	X	NO	YES
11	Ireland	YES	YES	YES	YES
12	Italy	YES	NO	NO	YES
13	Israel	X	X	X	X
14	Jamaica	YES	YES	NO	YES
15	Japan	YES	YES	YES	YES
16	Jersey	YES	X	YES	YES
17	Kenya	YES	YES	YES	NO
18	Korea	YES	YES	YES	YES
19	Latvia	YES	YES	YES	YES
20	Lithuania	YES	YES	YES	NO

		Is dominant firm's cost data used?	Is cost data of other firms used?	Is intent relevant?	Are effects required, such as market foreclosure or consumer harm?
21	Mexico	YES	NO	YES	NO
22	New Zealand	YES	YES	YES	NO
23	Norway	X	X	X	X
24	Peru	YES	YES	YES	YES
25	Russia	YES	NO	NO	YES
26	Serbia	X	X	X	X
27	Singapore	X	X	YES	X
28	Slovak Republic	X	X	X	X
29	South Africa	YES	YES	NO	NO for section 8(d)(iv) YES for section 8(c)
30	Switzerland	YES	YES	YES	NO
31	Turkey	YES	YES	YES	NO
32	Taiwan	YES	YES	YES	YES
33	United Kingdom	YES	YES	YES	[X]
34	United States	YES	NO	NO	YES

Table 6 Justifications and Defenses in Agency Responses

		Are justifications or defenses permitted?	Is the burden of proof on dominant firm?
Questionnaire		12	12.a.
1	Brazil	YES	YES
2	Bulgaria	YES	X
3	Canada	YES	X
4	Chile	YES	YES
5	Czech Republic	YES	X
6	Denmark	YES	YES
7	European Com.	YES	YES
8	France	YES	YES
9	Germany	YES	X
10	Hungary	YES	YES
11	Ireland	YES	YES
12	Italy	YES	X
13	Israel	X	X
14	Jamaica	YES	YES
15	Japan	YES	X
16	Jersey	YES	X
17	Kenya	NO	X
18	Korea	YES	YES
19	Latvia	X	X
20	Lithuania	X	X
21	Mexico	YES	YES

		Are justifications or defenses permitted?	Is the burden of proof on dominant firm?
22	New Zealand	YES	X
24	Norway	X	X
25	Peru	YES	YES
26	Russia	NO	X
27	Serbia	X	X
28	Singapore	YES	YES
29	South Africa	YES	YES
30	Switzerland	YES	X
31	Taiwan	YES	X
32	Turkey	YES	NO
33	United Kingdom	YES	YES
34	United States	YES	YES

[i] The charts in this Annex are an abridged summary of the questionnaire responses, taking into account subsequent comments. The questionnaire responses themselves, which are posted on ICN's website, should be referenced for more detailed information. These simplified chart entries cannot fully reflect the complexity of each agency's approach or adequately capture the differences between jurisdictions in the way they apply each criterion. An "X" indicates no answer was provided.

[ii] The response from the Norwegian agency stated that its practice is harmonized with the EC and therefore it did not respond to questions one to twelve.

[iii] The Slovak agency did not respond to most questions because it has not investigated any predatory pricing cases.